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FARINA FARIKULLAH KHAN v. RAKIAH MOHD SHAH; SHAMSIAH FARI KULLOH & ORS (INTERVENERS)

HIGH COURT MALAYA, KUALA LUMPUR
ROZ MAWAR ROZAIN JC
[ORIGINATING SUMMONS NO: WA-24NCvC-2966-09-2022]
14 SEPTEMBER 2023

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Abstract – *(i) To obtain a civil court's determination and declaration that an adult is mentally disordered in the eyes of the law, an application for inquiry may be made under s. 51 of the Mental Health Act 2001 ('MHA'). The civil court is rightfully equipped with the power and jurisdiction to hear matters under the MHA; that jurisdiction does not offend the jurisdiction of the Syariah Court and the State laws, nor does it contravene any articles in the Federal Constitution; (ii) There is no State Legislation that confers the Syariah Court to determine the mental capacity of an adult (a Muslim at that) and guardianship over such adult found to be mentally disordered. Such jurisdiction must be specifically conferred.*

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CIVIL PROCEDURE: *Originating summons – Striking out – Application for – Originating summons filed under s. 52 of Mental Health Act 2001 ('MHA') seeking court's orders for inquiry and reliefs – Whether court equipped with jurisdiction to hear matters under MHA – Whether there was reasonable cause of action – Whether there was abuse of court process*

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CIVIL PROCEDURE: *Jurisdiction – Civil and Syariah Courts – Whether there is State Legislation conferring Syariah Court to determine mental capacity of adult and guardianship over such adult found to be mentally disordered – Syariah Court order awarded rights of temporary care of disabled mother to one of male siblings – Whether Syariah Court order an interim order and not final order – Whether civil court could decide whether Syariah Court order valid or constitutional – Whether civil court's power to hear originating summons under Mental Health Act 2001 offended or breached Syariah Court order and jurisdiction*

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The plaintiff filed this originating summons ('OS') under s. 52 of the Mental Health Act 2001 ('MHA') seeking this court's orders for; (i) inquiry: as the defendant was *prima facie* found to be mentally disordered, an order by this court to fix a date, time and place for the inquiry to ascertain her state of mind. That the inquiry be directed to determine the nature and degree of the defendant's condition, the nature of the property belonging to her, her relative and any other circumstances considered relevant to the estate, the defendant and her condition; and (ii) reliefs: in the event the inquiry confirmed that the defendant is mentally disordered and incapable of managing herself and her affairs, the plaintiff be committed the charge of the defendant's affairs as her sole guardian or a committee of one. Additionally,

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the charge of her estate was to be committed to a committee comprising the plaintiff and such other persons this court deemed proper and necessary. Upon undertaking to the satisfaction of this court that the defendant shall be properly taken care of, the plaintiff also sought that the defendant be made over to the care of the plaintiff. The plaintiff confirmed that the defendant was currently suffering from advanced Parkinson, stage 3 Alzheimer and dementia. Given her mental condition and health, she was incapable of managing herself and her own affairs. The plaintiff averred that she was the most appropriate and suitable person to be appointed as guardian or a committee of one to manage the defendant's affairs. Days after the filing of the plaintiff's application, her siblings sought this court's order to allow them to participate in the proceedings as interveners, which was allowed by this court, as they would all be directly concerned and affected by this court's order that pertained to their mother, the defendant. A feature in the arguments of the parties was an order by the Terengganu Syariah High Court ('Syariah High Court order') that involved the plaintiff and her seven siblings including the six interveners. The Syariah High Court order granted the second, third and sixth interveners (the male siblings of the plaintiff) the responsibility for providing sustenance and care for the defendant. It was also ordered that the defendant's temporary custody rights should be handed over to the second intervener and the implementation of the terms of the order prayed for should be at the discretion/wisdom of the second, third and sixth interveners until the disposal of the main suit. The plaintiff filed this OS. Meanwhile, back at the Syariah High Court, an *inter partes* hearing was heard with the plaintiff and the sixth intervener in attendance. It was ordered that the said Syariah High Court order become the interim order until the disposal of the main suit and that the plaintiff was granted leave to file any affidavits in reply before a certain date should she wish to set aside or vary the Syariah High Court order. Thereafter, pursuant to the application by the second intervener, the Syariah High Court ordered that both the said orders were final and that they were the interim orders effective until the disposal of the main suit. The interveners relied on O. 18 r. 19(1)(b) and/or (d) of the Rules of Court 2012 ('ROC') to strike out the OS on these grounds; (i) infringement of the Federal Constitution ('FC'); (ii) jurisdiction or rather the lack thereof of the civil courts on matters revolving Islamic law; and (iii) collateral attack against a decision/ruling from another competent court (the Syariah High Court order). The interveners submitted that the OS was not a genuine action and was filed to achieve ulterior motives known only to the plaintiff. It was also the interveners' submission that as the defendant was a Muslim, the issue of guardianship exclusively fell under the purview of the Syariah and Islamic laws. The issues that arose were (i) whether this court had the jurisdiction to hear matters under the MHA; (ii) whether there was reasonable cause of action; and (iii) whether the plaintiff's OS was an abuse of the process of the court.

Held (dismissing interveners' application to strike out plaintiff's OS):

(1) There is no State Legislation that confers the Syariah Court to determine the mental capacity of an adult (a Muslim at that) and guardianship over such adult found to be mentally disordered. The Syariah Court order was not meted out on the laws pertaining to the mental disorder of the defendant, which was the cause of action of the plaintiff's OS. This court held in no uncertain terms, that it had the power and jurisdiction to hear matters under the MHA. The jurisdiction of this court to hear applications such as the plaintiff's OS did not offend the jurisdiction of the Syariah Court and the State laws, nor did it contravene any articles in the FC. There are no provisions in the State Legislation that provided for inquiry, declarations and reliefs concerning the mentally disordered. On the other hand, MHA is clear in empowering this court to hear such applications. Reference to O. 76 of the ROC additionally and in tandem, accorded this court jurisdiction. Hence, this court was equipped with jurisdiction to hear the plaintiff's OS. (paras 30-34)

(2) The interveners contended that the OS infringed the FC and referred to the Federal Court case of *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* that was instructive on the courts when dealing with such application to assess only the pleadings – whether on the face of it the court is prepared to hold that it discloses no cause of action. This court was not prepared to do so. The plaintiff's OS had clearly iterated the laws which was the MHA. On the face of it, there was nothing unconstitutional about the pleadings. (para 35)

(3) The Syariah Court order had ordered the second, third and sixth interveners to provide for the sustenance and care to the defendant. It did not address guardianship of the defendant and the charge of the defendant's estate. Therefore, to that extent, it could not be said the matters had already been adjudicated. Moreover, the Syariah Court order was not a final order but an interim order pending the disposal of the main suit. The Syariah Court order was an interim one that awarded the rights of temporary care of the defendant to the second intervener. To conclude that the physical care of the defendant had been adjudicated was inaccurate. (paras 40-43)

(4) It was not for this court to decide whether the Syariah Court order was valid or constitutional. What was paramount for this court was that it had indeed the jurisdiction to hear the plaintiffs' OS under the MHA. The plaintiff's OS concerned issues under the MHA which the plaintiff was entitled to apply, seeking orders according to the law. The MHA governs all Malaysians irrespective of religious faith. The reliefs prayed for by the plaintiff which were those this court was empowered to grant. This court had no intention to venture into the realm of the Syariah law

which was under the exclusive jurisdiction of the Syariah Court. It was only minded to adjudicate the plaintiff's OS under the MHA together with O.76 of the ROC. (paras 45 & 46)

(5) The determination of whether guardianship equated to physical custody to care for the defendant should not be made here at this juncture but at the necessary forum when the OS is heard. Thus, the interveners' submissions that the plaintiff's OS ought to be struck out under O. 18 r. 19(1)(d) of the ROC for abuse of process as it was claimed that it was a collateral attack against the Syariah Court order was not accurate and untenable. (para 52)

(6) To obtain this court's determination and declaration that the defendant was mentally disordered in the eyes of the law, an application for inquiry may be made under s. 51 of the MHA as what the plaintiff had done. All this had not been before the Syariah Court nor was it encompassed in the Syariah Court order. The remedy prayed for in the plaintiff's OS was distinctive and peculiar to MHA – an inquiry to ascertain whether the defendant could be declared mentally disordered, and if so, upon satisfaction of this court an order for the charge of her affairs to be committed to the plaintiff as sole guardian, and the charge of her estate be committed to a committee that comprised of the plaintiff and/or such other persons this court deemed proper and necessary. This court would hear the plaintiff's OS under MHA, as it was rightfully equipped with the power and jurisdiction. It did not offend or breach the Syariah Court order and the jurisdiction of the Syariah Court. This was not a plain and obvious case to strike out and it could not be said that the OS was obviously unsustainable. (paras 48, 50 & 55)

Case(s) referred to:

A v. Mahkamah Rayuan Syariah Wilayah Persekutuan & Ors [2022] 8 CLJ 75 HC ***(refd)***

Azizah Ibrahim v. Sufian Che Mud [2012] 4 ShLR 1 ***(refd)***

Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Chan Tse Yuen & Co v. Yap Chin Gaik, Elaine & Ors [2017] CLJU 1409; [2017] 1 LNS 1409 HC ***(refd)***

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ Rep 77 SC ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***

Hasnah Baba v. Juliah Mohd Hassan [2020] CLJU 402; [2020] 1 LNS 402 HC ***(refd)***

Hisham Halim v. Maya Ahmad Fuaad & Ors [2021] CLJU 1890; [2021] 1 LNS 1890 HC ***(refd)***

Indah Desa Saujana Corp Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals

[2018] 3 CLJ 145 FC ***(refd)***

Kaliammal Sinnasamy v. Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors [2011] 2 CLJ 165 CA ***(refd)***

Kamariah Ali lwn. Kerajaan Negeri Kelantan, Malaysia & Satu Lagi Dan Rayuan Yang Lain [2002] 3 CLJ 766 CA ***(refd)***

Kerajaan Malaysia v. Yong Siew Choon [2005] 4 CLJ 537 FC ***(refd)***

Ketua Pegawai Penguatkuasa Agama & Ors v. Maqsood Ahmad & Ors And Another Appeal [2020] 10 CLJ 748 CA ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain [2007] 3 CLJ 557 FC ***(refd)***

Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman & Yang Lain [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 SC ***(refd)***

Majlis Agama Islam Selangor v. Dahlia Dhaima Abdullah & Another Appeal [2023] 2 CLJ 513 CA ***(refd)***

Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors [2003] 3 CLJ 289 FC ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***

Muhammad Danish Imran Che Lah lwn. Mohamad Azlan Nordin & Satu Lagi [2022] CLJU 677; [2022] 1 LNS 677 HC ***(refd)***

New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] CLJU 1; [1985] 1 LNS 1 FC ***(refd)***

Ranjeet Singh Sidhu & Anor v. Zavarco Plc & Ors [2016] 2 CLJ 975 HC ***(refd)***

Roshini Ochie Mohd Melvyn v. Ketua Pendaftar Mahkamah Syariah Wilayah Persekutuan & Ors [2021] MLJU 2263 ***(refd)***

Sabrina Kamarudin v. Mohd Syawal Sulaini [2013] 4 ShLR 56 ***(refd)***

Siti Hasnah Vangarama Abdullah v. Tun Mahathir Mohamad (As The President Of PERKIM) & Ors [2012] 7 CLJ 845 CA ***(refd)***

Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 2 CLJ 5 FC ***(refd)***

Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(refd)***

Tan Wei Hong & Ors v. Malaysia Airlines System Bhd & Ors [2018] 2 CLJ 84 CA ***(refd)***

Tune Insurance Malaysia Bhd v. Muhammad Asraf Johan & Anor [2020] CLJU 1720; [2020] 1 LNS 1720 HC ***(refd)***

Wan Johairiza Wan Ab Rahman v. Mahkamah Rayuan Syariah Selangor & Ors [2021] CLJU 2151; [2021] 1 LNS 2151 HC ***(refd)***

Wani Abdullah & Satu Lagi lwn. Ketua Pengarah Jabatan Kehakiman Syariah Malaysia & Lain-lain [2019] MLJU 1929 ***(refd)***

Wong Kien Yip & Anor v. Byard Spiral Mill Sdn Bhd & Another Appeal [2022] 5 CLJ 289 CA ***(refd)***

Legislation referred to:

Administration of Islamic Religious Affairs Enactment of the State of Pulau Pinang 1993, s. 48(2)(b)(v), (vii), (ix)

Courts of Judicature Act 1964, s. 24(e)

Federal Constitution, arts. 5(1), 21(1A), 74(2), 121(1A)

Islamic Family Law (Terengganu) Enactment 2017, ss. 61, 82

Mental Disorders Health Ordinance 1952, s. 2
Mental Health Act 2001, ss. 2(1), 51, 52
Rules of Court 2012, O. 15 r. 6(2)(b)(i), O. 18 r. 19(1)(b), (d), O. 76
Syariah Court Enactment (Terengganu) 2001, ss. 11(3)(b)(iii), 244, 245

For the plaintiff - Amer Hamzah Arshad, Nur Izni Syazwani Ahmad, Siti Summaiyah & New Sin Yew; M/s Amerbon
For the 1st, 3rd-7th interveners - Nik Azila Shuhada Nik Abdullah, Ong Tze Xian & Tong Wei Hang; M/s Shearn Delamore & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Roz Mawar Rozain JC:

The Plaintiff's OS

[1] The plaintiff filed this OS under s. 52 of the Mental Health Act 2001 (MHA) seeking this court's orders for:

(i) inquiry: as the defendant is *prima facie* found to be mentally disordered, an order by this court to fix a date, time and place for the inquiry to ascertain her state of mind. That the inquiry be directed to determine the nature and degree of the defendant's condition, the nature of the property belonged to her, her relative and any other circumstances considered relevant to the estate, the defendant and her condition; and

(ii) reliefs: in the event the inquiry confirms that the defendant is mentally disordered and incapable of managing herself and her affairs, the plaintiff be committed the charge of the defendant's affairs as her sole guardian or a committee of one. Additionally, the charge of her estate is committed to a committee comprising the plaintiff and such other persons this court deems proper and necessary. Upon undertaking to the satisfaction of this court that the defendant shall be properly taken care of, the plaintiff also sought that the defendant be made over to the care of the plaintiff.

[2] The plaintiff averred that the defendant was found to suffer from dementia in 2012 by Dr Siva Seeta Ramaiah, a specialist at Subang Jaya Medical Centre. The specialist had observed she showed signs of dementia. In 2016, she was diagnosed with Parkinson's Disease stage 3. Her dementia was confirmed as moderate to severe. The defendant was unable to walk since August 2018 and a professional caregiver has been employed to help care and manage the defendant. On 1 September 2022, another doctor treated the defendant who had experienced psychotic symptoms had additionally found that her long history of dementia and memory impairment had resulted in behavioural and psychological symptoms of dementia.

[3] The plaintiff confirmed that the defendant is currently suffering from Advance Parkinson, Stage 3 Alzheimer and Dementia. Given her mental condition and health, she is incapable of managing herself and her own affairs. She is on full time professional care as she requires assistance in all her daily activities. The plaintiff had also disclosed that a neurologist in 2022 found that the defendant had difficulties swallowing and often cough whilst eating that stem from the Parkinson's Disease.

[4] It was averred that she had been taking care of the defendant all these years even before the defendant's mental condition deteriorated. The plaintiff averred that she was the most appropriate and suitable person to be appointed as guardian or a committee of one to manage the defendant's affairs. The plaintiff detailed at length of how her residence has the appropriate features and is suitable to care for the defendant. The plaintiff had also listed down why she, out of the other seven siblings (the interveners), was the fittest to be appointed as the defendant's guardian or committee of one to manage her affairs and estate.

[5] The plaintiff was candid in her affidavit in support of her application in iterating the sibling dispute that she contended to have been due to her marriage in October 2021 which her siblings disapproved. She claimed that her siblings had collectively decided to prevent her from continuing to take care of the defendant as a punishment as they had disapproved of her marriage in October 2021. Her narrative that the second intervener had obtained an *ex parte* order from the Syariah Court on 15 August 2022 that he be given the sole rights to allow or disallow anyone from seeing the defendant was in pursuant of that purpose. She had initiated legal steps to challenge/set it aside. The plaintiff had particularised her version on how she had been continuously denied by all the interveners from having access to the defendant.

The Interveners

[6] Ten days after the filing of the plaintiff's application, her siblings sought this court's order to allow them to participate in the proceedings as interveners. This court allowed the siblings to intervene as interveners. The basis was that they would all be directly concerned and affected by this court's order that pertained to their mother, the defendant.

[7] This court's attention was invited by the siblings to the allegations averred in the plaintiff's affidavit and sought the opportunity to respond to them. A Terengganu Syariah High Court order was introduced that ordered the brothers of the plaintiff to make provision for sustenance and care for the defendant. For those reasons, this court was satisfied that it was the apt circumstance under O. 15 r. 6(2)(b)(i) of the Rules of Court 2012 (ROC) to allow the plaintiff siblings as interveners in this case – at this juncture, six of her siblings are the named interveners.

The Terengganu Syariah High Court Order

[8] A feature in the arguments of the parties is an order by the Terengganu Syariah High Court on 15 August 2022 (the Syariah High Court order) that involved the plaintiff and her seven siblings including the six interveners. The proceedings there concerned the defendant. The Syariah High Court order was granted *ex parte* with only the presence of the second intervener as the applicant. The Syariah High Court order granted the second, third and sixth interveners (the male siblings of the plaintiff) the responsibility for providing sustenance and care for their mother, the defendant. The wordings of the order are:

> SAYA PERINTAHKAN bahawa Pemohon, Responden 3 dan Responden 4 hendaklah bertanggungan untuk menyediakan nafkah dan jagaan kepada ibu kandung yang Bernama RAKIAH BINTI MOHD SHAH (NO K/P: 360630-11-5072) menurut Seksyen 61 Enakmen Undang-Undang Keluarga Islam 2017 dan dibawa Bersama Seksyen 11(3)(b)(iii) Enakmen Mahkamah Syariah (Terengganu) 2001 dan Seksyen 244, 245 Enakmen Tatacara Mal Mahkamah Syariah (Terengganu) 2001.

[9] It was also ordered that the defendant's temporary custody rights should be handed over to the second intervener and the implementation of the terms of the order prayed for should be at the discretion/wisdom of the second, third and sixth interveners until the disposal of the main suit. reproduced herein is the order in the original language:

> SAYA PERINTAHKAN hak jagaan sementara ibu kandung yang bernama RAKIAH BINTI MOHD SHAH (NO KJP: 360630-11-5072) (selepas ini disebut sebagai "ibu kandung tersebut") hendaklah diserahkan kepada Pemohon dan di atas kebijaksanaan Pemohon, Responden 3 dan responden 6 untuk melaksanakan terma-terma perintah yang dipohon sehingga kes Induk Tuntutan Nafkah dan Jagaan Ibu diputuskan atau mana-mana perintah yang terdahulu diputuskan oleh Mahkamah.

[10] The plaintiff filed this originating summons (OS) on 13 September 2022. Meanwhile back at the Syariah High Court, an *inter partes* hearing was heard on 14 September 2022 with the plaintiff and the sixth intervener in attendance. It was ordered that the said Syariah High Court order becomes the interim order until the disposal of the main suit and that the plaintiff was granted leave to file any affidavits in reply before 23 October 2022 should she wishes to set aside or vary the Syariah High Court order. There are no records or averments before this court as to whether the plaintiff had filed any affidavit at the Terengganu Syariah High Court.

[11] Thereafter, on 12 February 2023, pursuant to the application by the second intervener, the Syariah High Court ordered that both the said orders were final and that they were the interim orders effective until the disposal of the main suit.

[12] There was then a decision by the Terengganu Syariah Court of Appeal that ruled, after a judicial review, that the order dated 14 September 2022 was set aside but upheld the Syariah High Court order until the disposal of the main suit. At the time of the hearing of this application to strike out the OS by the interveners in this court, the matter in the Terengganu Syariah High Court was still pending. The Syariah High Court order was still effective (hereinafter referred to as the Syariah Court order).

The Interveners' Application To Strike Out The Plaintiff's OS

[13] The interveners relied on O. 18 r. 19(1)(b) and/or (d) of the Rules of Court 2012 (ROC) to strike out the OS. Learned counsel for the interveners premised their submissions on:

(i) infringement of the Federal Constitution;

(ii) jurisdiction or rather the lack thereof of the civil courts on matters revolving Islamic law; and

(iii) collateral attack against a decision/ruling from another competent court (the Syariah High Court order).

[14] The interveners led their submissions with the fact that this suit concerned subjecting an 87-year-old bedridden elderly to a life-dangering exercise which was unnecessary and against her best interest. The interveners submitted that the OS was not a genuine action and filed to achieve ulterior motives known only to the plaintiff. There were many contentions to which the interveners had submitted at length that amounted to the OS not disclosing any cause of action but is scandalous, frivolous, and vexatious and an abuse of process. This court's deliberations are set out below after the consideration of the intervener's central objection based on the jurisdiction of the civil courts that does not extend to Syariah and Islamic laws. Learned counsel for the interveners submitted that the issues to be adjudicated pursuant to the OS are guardianship and/or estate management which are all matters falling under the purview of Syariah and Islamic laws.

Jurisdiction Of The Civil Court

[15] It was the interveners' submissions that as the defendant is a Muslim, the issue of guardianship exclusively falls under the purview of the Syariah and Islamic Laws. The interveners submitted that the relief sought by the plaintiff for the guardianship of the defendant are issues of 'penjagaan' and 'nafkah' of a Muslim parent. Article 74(2) of the Federal Constitution (FC) was referred to where Item 11 in the Ninth Schedule that conferred powers to the State to enact State Legislature under State List:

> Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putraiava, **Islamic Law and personal and family law of persons professing the religion of Islam, including Islamic law** relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and

non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah, and Baitulmal or similar Islamic religious revenue, mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

(the emphases are the Interveners')

[16] This court was referred to the Islamic Family Law (Terengganu) Enactment 2017 enacted by the Terengganu State Legislature. It was submitted that the laws are clear and unambiguous and the literal rule was applicable and their plain and ordinary meaning ought to be construed and applied (*Kerajaan Malaysia v. Yong Siew Choon* [2005] 4 CLJ 537; [2006] 1 MLJ 1 and *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35).

[17] That law as well as the Federal Court decision of *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1; [2008] 2 MLJ 147 and the Court of Appeal's in *Majlis Agama Islam Selangor v. Dahlia Dhaima Abdullah & Another Appeal* [2023] 2 CLJ 513 were relied on by the interveners to support their contention that the reliefs sought for by the plaintiff were within the purview of the Terengganu Syariah High Court. It was submitted that this court was not the right forum to hear the OS (*Hisham Halim v. Maya Ahmad Fuaad & Ors* [2021] CLJU 1890; [2021] 1 LNS 1890; [2021] MLJU 2293, *Roshini Ochie Mohd Melvyn v. Ketua Pendaftar Mahkamah Syariah Wilayah Persekutuan & Ors* [2021] MLJU 2263, *Wan Johairiza Wan Ab Rahman v. Mahkamah Rayuan Syariah Selangor & Ors* [2021] CLJU 2151; [2021] 1 LNS 2151; [2021] MLJU 2586 and *Wani Abdullah & Satu Lagi lwn. Ketua Pengarah Jabatan Kehakiman Syariah Malaysia & Lain-lain* [2019] MLJU 1929.

[18] In their respectful submission that this court and any civil court for this matter, did not have jurisdiction over the matters in this OS, this court was reminded of art. 121(1A) of the FC that specifically provided that the High Court in the states of Malaya and in the states of Sabah and Sarawak shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts. Amongst the authorities referred to by the interveners were *Ketua Pegawai Penguatkuasa Agama & Ors v. Maqsood Ahmad & Ors And Another Appeal* [2020] 10 CLJ 748; [2021] 1 MLJ 120, *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ

2768; [1991] 1 CLJ (Rep) 77; [1992] 1 MLJ 1, *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5; [1999] 1 MLJ 489 and *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557; [2007] 4 MLJ 585.

[19] From this, the interveners submitted that the OS is the plaintiff's attempt to invite this court to encroach into the exclusive jurisdiction of the Syariah Court and also a collateral attack against the Syariah High Court order. This court was implored to conclude that the plaintiff's attempt to re-litigate the issues already decided in the Syariah High Court order was a misuse of the machinery of the civil courts which was an abuse of process. *A v. Mahkamah Rayuan Syariah Wilayah Persekutuan & Ors* [2022] 8 CLJ 75; [2022] 11 MLJ 548, *Kaliammal Sinnasamy v. Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors* [2011] 2 CLJ 165; [2012] 3 MLJ 694, *Kamariah Ali Dan Rayuan Yang Lain lwn. Kerajaan Negeri Kelantan Malaysia & Satu Lagi* [2002] 3 CLJ 766; [2002] 3 MLJ 657 dan *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545 to name a few, were the authorities the interveners referred to.

[20] In response, the ardent arguments put forth by learned counsel for the plaintiff had also commenced with the FC where art. 5(1) of the FC provides that to take away a person's right, it must be done according to the law. The rights of the defendant as an adult in making decisions for herself as well as legal responsibilities attached to her including to sue, be sued, be prosecuted, manage her assets and financial matters, amongst many others can only be taken away in accordance to the law. The case of *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] MLJU 620 was referred to. It was submitted vehemently that the OS is premised on the MHA determining the subject matter which is the lunacy of the defendant; the mental state of the defendant rather than 'guardianship' or 'maintenance' *per se*.

[21] This court's attention was invited to s. 24(e) of the Courts of Judicature Act 1964 (CJA) that provides the civil jurisdiction of the High Court shall include "jurisdiction to appoint and control guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind".

[22] Item 14 of the Ninth Schedule FC was referred to that states lunacy and mental deficiency are matters which only the Parliament has competency to make law. To corroborate the point that the civil courts have the jurisdiction to hear this suit, Part X MHA was also referred to that provides the power and jurisdiction to the civil courts to determine whether an adult is incapable to manage himself and his affairs due to a mental disorder and to appoint a committee or committees to manage him. It was pointed out that O. 76 of the ROC lays out the procedure that confirms the civil courts' jurisdiction.

[23] This court was reminded by the plaintiff that the Syariah Court order was still being challenged at the Terengganu Syariah High Court. Learned counsel for the plaintiff in his passionate submissions implored this court that the premise of the interveners' arguments to strike out this OS is wrong and misplaced – they had heavily relied on the Syariah Court order that they interpreted to give sole custodial rights which include maintenance and guardianship of the defendant to the second intervener; thus the plaintiff's OS that sought for the same ought to be struck out as this court does not have jurisdiction to determine rights and guardianship of the defendant who is a Muslim or there would be a contravention of art. 21(1A) of the FC.

[24] It was the plaintiff's submissions that the interveners' said arguments were misconceived as the Syariah Court can only exercise its power according to the jurisdiction derived from matters listed in Item 1, List II – State List in the Ninth Schedule to the FC. It does not include lunacy and mental deficiency which is under medicine and health in item 4, List 1 – Federal List in the Ninth Schedule to the FC which in turn accorded this court the jurisdiction. It was submitted that matters related to mental disorders and its laws can only be passed by the Parliament under Federal Laws, not the State Government through Syariah Laws. The MHA specified in s. 51 that it is the High Court that is empowered to determine matters under it – s. 52 provides:

> Court may order inquiry
>
> (1) The Court may, on an application made before it, make an order directing an inquiry to determine whether a person subject to the jurisdiction of the Court and alleged to be mentally disordered is incapable of managing himself and his affairs due to such mental disorder.
>
> (2) The order of the Court under subsection (1) may also contain directions for inquiries to be made concerning:
>
> (a) the nature of the property belonging to the person alleged to be mentally disordered;
>
> (b) the persons who are his relatives;
>
> (c) the period during which he has been mentally disordered; or
>
> (d) such other questions as the Court deems proper.
>
> (3) The application for such an inquiry may be made by a relative of the person alleged to be mentally disordered, or by any public officer nominated by the Minister for the purpose of making the application.

[25] Case laws were referred to in illustrating its arguments that MHA is also applicable to Muslims and the powers of the High Court to adjudicate matters together with O. 76 of the ROC – *Hasnah Baba v. Juliah Mohd Hassan* [2020] CLJU 402; [2020] 1 LNS 402, *Tune Insurance Malaysia Bhd*

v. Muhammad Asraf Johan & Anor [2020] CLJU 1720; [2020] 1 LNS 1720 and *Muhammad Danish Imran Che Lah lwn. Mohamad Azlan Nordin & Satu Lagi* [2022] CLJU 677; [2022] 1 LNS 677.

Decision On Jurisdiction

[26] Stating the obvious, there is no state legislation on mental disorder. Accordingly, Syariah Court does not have jurisdiction over it as its jurisdiction must be specifically conferred. It is not automatic, the State must claim ownership through the State Legislation or else it could be excluded from deciding on subject matters in Item 1, List II in the Ninth Schedule to FC – *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] MLJ 545 at para. 55 on p. 177 (CLJ); para. 61 on p. 574 (MLJ):

> The jurisdiction of Syariah Courts must be provided for by the State Legislature within the limits of Item 1; the courts do not have automatic jurisdiction over all the matters mentioned (see *Latifah bte Mat Zin* para [43]), in that its jurisdiction must be expressly conferred by state legislations. In other words, the state **must claim ownership over the subject matters that fall within the jurisdiction of the syariah courts by providing for it expressly in its legislation;** because otherwise, the syariah courts could be excluded from deciding on a subject matter which falls within Item 1 of List II (State List) in the Ninth Schedule to the Federal Constitution. This is an important point which in the past had affected the full effect of the Syariah Court's power when there is no express and clear provision enacted in the state enactment. A case in point is *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489. In that case, the Federal Court held that in the absence of any express provision (in the then Kedah Administration of Muslim Law Enactment 1962 conferring jurisdiction on the Syariah Court to decide on questions of apostasy), the Syariah Court has jurisdiction by implication; the court held that this is to be inferred from the language of the relevant provisions of the state enactments with regard to the conversion of Islam. (emphasis added)

[27] This court turns to the Islamic Family Law (Terengganu) Enactment 2017. On the issue of maintenance, the powers of the Syariah Courts over Muslims can be found in s. 61 and s. 82 where the latter specifically provides the power of the Syariah Court to order maintenance payments to parents. For easy reference, the provision reads:

> (1) the Court may order a son or daughter, who in the opinion of the Court afford, to pay maintenance to both the mother and father who are unable to support their own living;
>
> (2) if a parent does not have a son or daughter or his son or daughter has died or the place where the son or daughter is unknown or if and to the extent that the son or daughter was unable to maintain both her mother and father, the Court may order any male heirs according to order of 'asobah in the faraid to pay maintenance to both mother and father;

(3) any money spent by the male relatives according to order of 'asobah in the faraid in maintaining both the mother and father as required under subsection (2) may be recovered from the child when the child is capable to pay the maintenance.

[28] The Syariah Court order was based on three legal provisions. The first was s. 61 of the Islamic Family Law (Terengganu) Enactment 2017 and not s. 82 above. The provision of s. 61 reads:

> The Court may order any person liable thereto according to Hukum Syarak, to pay maintenance to another person where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health and the Court is satisfied that having regard to the means of the first-mentioned person it is reasonable so to order.

[29] The premise of the Syariah Court order was to be read together with s. 11(3)(b)(iii) of the Syariah Court Enactment (Terengganu) 2001 and ss. 244, 245 of the Syariah Court MAL Procedure Enactment (Terengganu) 2001. They are reproduced below to demonstrate this court's assessment, in Bahasa Malaysia, s. 11(3)(b)(iii) Enakmen Mahkamah Syariah (Terengganu) 2001 reads:

> Mahkamah Tinggi Syariah hendaklah:
>
> Dalam bidang kuasa malnya, mendengar dan memutuskan semua tindakan dan prosiding jika semua pihak dalam tindakan atau prosiding itu adalah orang Silam dan tindakan atau prosiding itu adalah berhubungan dengan:
>
> Nafkah orang-orang tanggungan, kesahtarafan, atau penjagaaan atau jagaan (hadanah) budak-budak;

[30] It is specifically provided in s. 244 of the Syariah Court MAL Procedure Enactment (Terengganu) 2001 that, nothing in it can be construed as limiting the inherent powers of the Syariah Court whilst s. 245 acknowledged Syariah Laws – the words of s. 245 states:

> (1) Mana-mana peruntukan atau tafsiran peruntukan di bawah Enakmen ini yang tak selaras dengan Hukum Syarak hendaklah terbatal setakat ketakselarasan itu.
>
> (2) Jika terdapat apa-apa lacuna atau jika apa-apa perkara tidak diperuntukkan dengan nyata dalam Enakmen ini, Mahkamah hendaklah menggunakan Hukum Syarak.

[31] Looking at the legislations above and those referred to, there is no State Legislation that confers the Syariah Court to determine mental capacity of an adult (a Muslim at that) and guardianship over such adult found to be mentally disordered. The Syariah Court order was not meted out on the laws pertaining to the mental disorder of the defendant, which is the cause of action of the plaintiff's OS.

[32] This court holds in no uncertain term, that it has the power and jurisdiction to hear matters under the MHA. That jurisdiction of this court to hear applications such as the plaintiff's OS does not offend the jurisdiction of the Syariah Court and the State laws, nor does it contravene any articles in our FC.

[33] The Federal Court's decision in *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors* [2003] 3 CLJ 289; [2003] 3 MLJ 705 is instructive in that this court must decide on the contention of jurisdiction. In that case at the High Court, the respondent had sought a declaration that certain pieces of land be surrendered to the deceased's estate. The appellant raised a preliminary objection that the High Court did not have jurisdiction over the matter and filed an application to strike out. The High Court in its decision reasoned that the Syariah Court has no jurisdiction to issue the injunction and reliefs applied for by the respondent, and that the Syariah Court had no power to adjudicate on the will and the deed of settlement. The High Court took this approach laid out in *Majlis Agama Islam Pulau Pinang lwn. Isa Abdul Rahman & Yang Lain* [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201; [1992] 2 MLJ 244. The Court of Appeal concurred with the said decision. At the Federal Court, it was held that the High Court should have focused its mind more on the primary issue of jurisdiction instead of considering at length the principles involved in an application to strike out. The Penang Enactment gave the Syariah Court the power under s. 48(2)(b)(v), (vii) and (ix) so it was wrong for the High Court to consider the two instruments disclosed and conclude on the principles of O. 18 r. 19 application that it was neither a plain and obvious case that the claim was obviously unsustainable. The central issue was jurisdiction.

[34] The Federal Court ruled that the right approach was the subject matter approach rather than the remedy approach as per the Federal Court's decision in *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5; [1999] 1 MLJ 489 to determine whether the Syariah Court was vested with jurisdiction. Unlike in that case where the subject matters were clearly stated in s. 48(2)(b)(v), (vii) and (ix) of the Administration of Islamic Religious Affairs Enactment of the State of Pulau Pinang 1993, there are no provisions in the State Legislation that provided for inquiry, declarations and reliefs concerning the mentally disordered. On the other hand, MHA is clear in empowering this court to hear such applications. Reference to O. 76 of the ROC additionally and in tandem, accord this court jurisdiction. Hence, this court in its application of the subject matter approach, rules that it is equipped with jurisdiction to hear the plaintiff's OS.

Reasonable Cause Of Action

[35] The interveners' application to strike out was not under limb 1(a) of O. 18 r. 19 of the ROC although it was submitted that the plaintiff's OS ought to be struck out as it did not disclose reasonable cause of action. The

Interveners contended that the OS infringes the Federal Constitution. The Federal Court's case of *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] CLJU 1; [1985] 1 LNS 1; [1985] 1 MLJ 226 was referred to that was instructive on the courts when dealing with such application to assess only the pleadings – whether on the face of it the court is prepared to hold that it discloses no cause of action. This court is not prepared to do so. The plaintiff's OS has clearly iterated the laws which is the MHA. On the face of it, there is nothing unconstitutional about the pleading. Nonetheless, the interveners' application was not moved under this limb 1(a). The *ratio decidendi* for the interveners' application is premised on the issue of whether the OS is scandalous, frivolous and vexatious under limb 1(b) and/or it amounted to an abuse of court process under limb 1(d).

Scandalous, Frivolous And Vexatious

[36] The interveners expanded their submissions to the context of frivolous and vexatious that carry the meaning of obviously unsustainable or wrong – *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11 and *Tan Wei Hong & Ors v. Malaysia Airlines System Bhd & Ors* [2018] 2 CLJ 84; [2017] 4 MLJ 540.

Abuse Of Process

[37] The interveners submitted that the plaintiffs OS was an abuse of the court process and ought to be struck out on the following basis:

(i) the defendant is a Muslim and governed by the Syariah Islamic Laws under the purview of the Syariah Court;

(ii) the issues to be adjudicated – guardianship falls exclusively under the purview of the Syariah Court and the Islamic Law;

(iii) the exclusive jurisdiction conferred by the Federal Constitution (Item 1 in List II – State List in the Ninth Schedule) grant the Syariah Court exclusive jurisdiction;

(iv) civil courts have no jurisdiction over Syariah and Islamic Law; and

(v) the Syariah Court had already adjudicated and decided on the issues of guardianship and/or estate management that fell within its purview and exclusive jurisdiction.

[38] This court regarded the interveners' submissions that the plaintiff's OS was a collateral attack against the Syariah Court order. It was submitted that the plaintiff was attempting to re-litigate the matters before the Syariah Court and sought for this court to review, nullify and/or sidestep the Syariah Court order. The background that led to the proceedings at the Terengganu High Court according to the plaintiff is as follows:

(i) the defendant was taken care of in the residence of the fifth intervener – all the siblings were in agreement with the arrangement except for the plaintiff;

(ii) on 4 July 2022, the plaintiff had removed the defendant from the residence of the fifth intervener without the agreement and consent of all her siblings. There was an altercation which involved harm done on the first intervener;

(iii) on 9 July 2022, the plaintiff did not allow the defendant to attend the Raya AidilAdha celebrations at one of her siblings' residence that had been their family tradition for the past thirty-seven years;

(iv) on 21 July 2022, the fourth intervener was unable to fetch the defendant from the plaintiffs residence to ferry her for a follow-up check with the neurologist consultant. The plaintiff had blocked the easement with her parked car prevented the defendant to exit;

(v) on 22 July 2022, the second intervener was not able to ferry the defendant to the said follow up check-up due to the plaintiff's cars parked that had blocked the easement for the defendant;

(vi) the plaintiff claimed that she would only return the defendant following a court order;

(vii) on 10 August 2022, the second intervener filed in an application at the Terengganu Syariah High Court for an order for the maintenance and care of the defendant;

(viii) on 12 August 2022, the defendant was sent by the plaintiff to the fourth intervener's residence to enable the plaintiff to attend her daughter's graduation in Sydney Australia;

(ix) on 15 August 2022, the Syariah Court order was obtained *ex parte* (the Syariah Court order);

(x) on 13 September 2022, the plaintiff filed the OS in this court;

(xi) on 14 September 2022, following the *inter partes* hearing the Syariah High Court granted the interim order for maintenance and care of the defendant;

(xii) on 12 February 2023, the Syariah High Court held that the Syariah Court order be maintained until the disposal of the main suit;

(xiii) on 3 April 2023, the Syariah High Court issued a letter to the Chief Registrar of the Terengganu Syariah Court of Appeal to review the inter-partes order of 14 September 2023 as at that material time the hearing of the *inter partes* had yet to be completed; and

(xiv) on 10 April 2023, the Terengganu Syariah Court of Appeal decided to set aside the *inter partes* order of 14 September 2023 only. As per the Syariah High Court's decision on 12 February 2023, the Syariah Court order remains in force until the disposal of the main suit.

[39] For the argument of abuse of court process, this court was persuaded by the interveners to look into the reliefs sought by the plaintiff in her OS. In particular, the charge of the defendant's affairs as a sole guardian, and that the charge of the defendant's estate be committed to a committee that comprised of the plaintiff and others appointed by this court. And not less important, that the defendant be made over to the care of the plaintiff. Those are matters squarely under the regulation of MHA. The interveners submitted that although the application was filed to move this court under MHA, the reliefs sought to show the end result which had already been adjudicated as seen from the Syariah Court order.

[40] The Syariah Court order ordered the second, third and sixth interveners to provide for the sustenance and care to the defendant. It did not address guardianship of the defendant. It did not address the charge of the defendant's estate. Therefore, to that extent, it cannot be said the matters had already been adjudicated. Moreover, the Syariah Court order is not a final order but an interim pending the disposal of the main suit.

[41] There is the issue on the last relief the plaintiff prayed for in her OS which was for the care of the defendant to be placed with the plaintiff. To this, from the submissions before this court, the plaintiff intended for physical custody to care for the defendant. Learned counsel for the interveners argued it had been adjudicated where the second order in the Syariah Court order stated that the rights of temporary care of the defendant was to be surrendered to the second intervener, and left the execution of the terms of the order prayed for to his wisdom together with that of the third and sixth interveners, until the disposal of the main suit at the Terengganu Syariah High Court.

[42] The plaintiff had filed a preliminary objection at the Terengganu Syariah High Court to set aside the Syariah Court order. She had also initiated an application for judicial review to challenge its validity. Until all those are disposed of, the Syariah Court order remains in place, valid and effective.

[43] Be that as it may, this court finds the arguments by the interveners unacceptable. The Syariah Court order is an interim one that awarded the rights of temporary care of the defendant to the second intervener. To conclude that the physical care of the defendant had been adjudicated was inaccurate.

[44] It was argued by the plaintiff that the Syariah Court order was premised on laws that did not concern the guardianship of parents – the interesting submissions encompassed the interpretation of the said laws. This court concludes that the issue of charge over the defendant's estate and guardianship are separate and distinct from those of providing sustenance and care. Although the relief prayed for by the plaintiff that the defendant be

made over to the care of the plaintiff infers physical care over the defendant, it is not exactly providing sustenance and care. One can be under the physical care of a party and her sustenance provided for by others. In any event, it is this court's considered view that it cannot be the basis to strike out this OS on the ground that this court has no jurisdiction. This court deliberated on the other following submissions:

(i) Item 1, List II – State List in the Ninth Schedule to the FC that does not provide matters of lunacy and mental capacity;

(ii) Islamic Family Law (Terengganu) Enactment 2017 that does not provide for physical care and custody of parents nor those mentally incapacitated although it gives the Syariah Court powers to order sons or daughters to pay maintenance for the category of parents and any person for the cases of those mentally incapacitated;

(iii) Enakmen Mahkamah Syariah (Terengganu) 2001 that is also silent on the physical care and custody of parents although there the Syariah Court has power concerning custody and care for children;

(iv) the cases referred including *Azizah Ibrahim v. Sufian Che Mud* [2012] 4 ShLR 1 and *Sabrina Kamarudin v. Mohd Syawal Sulaini* [2013] 4 ShLR 56 that concerned the Syariah Court's powers over matters of care and custody of children with reference to the powers under s. 11(3)(b)(iii) of the Enakmen Mahkamah Syariah (Terengganu) 2001. The definition of penjagaan and hadhanah relates to the welfare, care and custody of children; and

(v) there are no specific State Legislations that provided for the maintenance and guardianship of parents or those of parents who are mentally disordered.

[45] It cannot be emphasised enough here that it is not for this court to decide whether the Syariah Court order was valid or constitutional. What is paramount for this court is that it has indeed the jurisdiction to hear the plaintiffs OS under MHA. The plaintiff's OS concerned issues under MHA which the plaintiff is entitled to apply, seeking orders according to the law. MHA governs all Malaysians irrespective of religious faith. The reliefs prayed for by the plaintiff which are those this court are empowered to grant. As per this court's reasons iterated above, this court finds that the angle of the said interveners' arguments is misplaced.

[46] This court has no intention to venture into the realm of the Syariah Law which is under the exclusive jurisdiction of the Syariah Court. It is only minded to adjudicate the plaintiff's OS under MHA together with O. 76 of the ROC. This court is unable to accept the submissions of the interveners that the plaintiff attempted to move this court to relitigate the issue already decided by the Syariah Court through the "back door way". This is because the Syariah Court had not decided on the mental state/disorder/lunacy of the defendant and made orders pursuant thereto.

[47] The MHA only came into force in 2010. Prior to that, there was the Lunatic Ordinance of Sabah 1951 followed by the Mental Disorders Ordinance of 1952 for Peninsular Malaysia; then in 1961 the Mental Health Ordinance Sarawak. The MHA consolidated the law of mental disorder and provides a framework for the delivery of comprehensive care, treatment, control, protection and rehabilitation of those with mental disorders. Comprehensive of those with mental disorders are provided for under MHA. It ensures that the best interests, dignity and respect of the person declared by the courts to be mentally disordered are protected. MHA defined mental disorder in s. 2:

> "mental disorder" means any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired; and "mentally disordered" shall be construed accordingly.

[48] To obtain this court's determination and declaration that the defendant is mentally disordered in the eyes of the law, an application for inquiry may be made under s. 51 of the MHA as what the plaintiff had done. All this had not been before the Syariah Court nor was it encompassed in the Syariah Court order.

[49] The temporary relief documented in the Syariah Court order ordered that the plaintiff and all her siblings were to give full cooperation to surrender the defendant for the physical care of the second intervener. All of the defendant's children were accorded full visitation rights and they were not to interfere or cause disturbances whether physical or emotional, nor were they to affect the harmony of the residence where the defendant was staying. These temporary orders are to be in place before the disposal of the main suit where the subject matter is not as per the plaintiff's OS.

[50] This court is of the opinion that the remedy prayed for in the plaintiff's OS is distinctive and peculiar to MHA – an inquiry to ascertain whether the defendant can be declared mentally disordered, and if so upon satisfaction of this court an order for the charge of her affairs to be committed to the plaintiff as sole guardian, and the charge of her estate be committed to a committee that comprise of the plaintiff and/or such other persons this court deems proper and necessary.

[51] Under s. 2(1) of the MHA "guardian" is only defined in relation to a minor – "means the parent or parents of the minor, or a person lawfully appointed by will or by an order of a competent court to be the guardian of the minor, or a person who has lawful custody of the minor." That would be inapplicable in this case. The *Black's Law Dictionary* affords the definition of guardianship that encompasses more than that pertaining to minors:

> A guardian is a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for some peculiarity of status, or defect of age, understanding, or self-control, is considered incapable of

A administering his own affairs. *Bass v. Cook*, 4 Port (Ala.) 392; *Sparhawk v. Allen*, 21 N. H. 27; *Burger v. Frakes*, 67 lowa, 460, 23 N.W. 746.A guardian Is a person appointed to take care of the person or property of another. Civ. Code Cal."

[52] The determination of whether guardianship equates to physical B custody to care for the defendant should not be made here at this juncture but at the necessary forum when the OS is heard. Thus, the interveners' submissions that the plaintiff's OS ought to be struck out under O. 18 r. 19(1)(d) for abuse of process as it is claimed that it was a collateral attack against the Syariah Court order is not accurate and untenable.

C **[53]** This court acknowledges that to move the court to declare a parent mentally disordered may not be what children commonly do, perhaps stemming from the values of the society or social stigma or maybe even the lack of knowledge of the repercussions of such a declaration. Yet, it is not unlawful for one such as the plaintiff to do so. Whether this court will grant D all the prayers she sought for will be decided after deliberation is carried out upon the hearing of the OS. But, her OS cannot be struck out at this juncture on the bases submitted by the interveners.

[54] There were arguments of bad faith at the long-drawn hearing of submissions for this application by the interveners to strike out the plaintiff's E OS (encl. 24). This court is inclined to take the position that allegations of bad faith cannot be a ground to strike out the OS. Should, at the hearing of the OS proper, bad faith is indeed proven, it would be reflected in the decision of the OS. The interveners too would have recourse in terms of costs or the right to claim for damages for tort of abuse of court process (*Ranjeet* F *Singh Sidhu & Anor v. Zavarco Plc & Ors* [2016] 2 CLJ 975, *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340, *Chan Tse Yuen & Co v. Yap Chin Gaik, Elaine & Ors* [2017] CLJU 1409; [2017] 1 LNS 1409; [2017] MLJU 1459).

This Court's Order

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[55] This court will hear the plaintiff's OS under MHA, as it is rightfully equipped with the power and jurisdiction. It does not offend or breach the Syariah Court order and the jurisdiction of the Syariah Court. None of the reasons cited by the interveners justify or warrant a striking out of the OS. The threshold had not been met – this is not a plain and obvious case to strike H out and it cannot be said that the OS is obviously unsustainable (see *Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, *Wong Kien Yip & Anor v. Byard Spiral Mill Sdn Bhd & Another Appeal* [2022] 5 CLJ 289; [2022] MLJU 244, *Tan Wei Hong v. Malaysia Airlines System Bhd* (*supr*a) and *Siti Hasnah Vangarama Abdullah* I *v. Tun Mahathir Mohamad (As The President Of PERKIM) & Ors* [2012] 7 CLJ 845).

[56] With that, the OS will not be struck out on the ground of want of this court's jurisdiction. Enclosure 24 – the application by the interveners to strike out the plaintiff's OS is hereby dismissed. Costs of RM15,000 is awarded to the plaintiff.

Observations By This Court

[57] From all the voluminous and illustrious affidavits filed herein, the catalyst to the filing of this OS by plaintiff is the internal sibling dispute that crystallised to the power struggle of the physical custody of the defendant. The interveners complained that the plaintiff had not complied with the Syariah Court order. This court will not and has not made a finding on the validity of the Syariah Court order. Therefore, it is still effective unless and until it is set aside or the full disposal of the main suit at the Terengganu Syariah Court. The proceedings before this court of the plaintiff's OS do not in any way operate as a stay of the Syariah Court order.

[58] All parties are reminded that non-compliance of the Syariah High Court order tantamount to contempt. The plaintiff as well as all the other interveners are to give their fullest cooperation to physically surrender the defendant to the second intervener or to whomever he entrusts and/or names to care for the defendant. The time frame stipulated in the Syariah Court order is with immediate effect. The plaintiff and all siblings that include the interveners must be given the right to visit and be with the defendant at any time with the prior consent of the applicant. The plaintiff and the interveners shall not cause any disturbance, whether physical or emotional, that would affect the harmony of the household where the defendant is cared for. There is also an order that the security and management of Valencia must give their fullest cooperation in the execution of the Syariah Court order. It would be a contempt of that order for any breach thereof. This court expects faithful adherence to the Syariah Court order by all parties duly bound by it.